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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1176

CITY OF MEMPHIS, WYETH CHANDLER,
THE COUNCIL OF THE CITY OF MEMPHIS
and EDWIN McBRAYER,

Petitioners,

V.

N. T. GREENE, ELNORA PRIEST CROSS,
EDWIN OWENS and CAROLYN BURSE,

Respondents.

BRIEF OF HEIN PARK CIVIC ASSOCIATION AMICUS CURIAE IN SUPPORT OF PETITIONERS

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THE AMICUS CURIAE AND ITS INTEREST

Hein Park Civic Association consists of members who are homeowners and residents of Hein Park Subdivision. This litigation concerns the closing by the Memphis City Council of the northern end of West Drive, a street which bisects Hein Park, at the request of the Association.

The closure was upheld by the United States District Court for the Western District of Tennessee, but reversed by the Sixth Circuit, an opinion from which this writ of certiorari has been granted. The holding of the Sixth Circuit that the closing of West Drive by the City at the request of its residents constituted a "badge of slavery" and the reopening of said street with the attendant increase in traffic in a residential area both directly affect members of the Hein Park Civic Association, many of whom live on West Drive.

QUESTIONS PRESENTED FOR REVIEW

1. Where a municipal government closes a street through a residential subdivision, without any racial motivation, but solely to reduce traffic, promote safety and enhance the quality of life for residents of the subdivision, does such action become a

"badge of slavery", prohibited by the Thirteenth Amendment, or a violation of 42 U.S.C. § 1982 solely because it will inconvenience the owners of property in a nearby neighborhood which is predominantly black?

2. Does the action of a municipality in closing a street for the purpose of traffic reduction (a permissible goal) violate the Thirteenth Amendment or 42 U.S.C. § 1982 solely because of disparate impact between non-residents of the area who are black and white area residents?

3. Does an injunction against the closing of a street in a residential subdivision deny equal protection of the law to the residents of the subdivision, by denying to them a reasonable and normal protection solely because they are of the white race?

STATEMENT OF THE FACTS

This case arises out of the response of the City of Memphis to a petition by residents of Hein Park Subdivision to close the northern end of West Drive, a street which traverses the subdivision from north to south, connecting two major east-west traffic arteries, East Parkway and Jackson Avenue.1/

1/ See Map, Appendix A to Court of Appeals Opinion. App. 168. A copy of a more legible map of the area is attached hereto for the convenience of the Court.

West Drive, inside the subdivision, is a two-lane street without sidewalks. It connects with Springdale Street which extends north from Jackson as a major, four-lane traffic artery.

Prior to the closing of West Drive, large amounts of traffic poured into it from Springdale and Jackson, headed south to North Parkway, and also in the reverse direction. It is noteworthy that use of West Drive does not shorten the ordinary motorist's route by so much as one foot. There is no evidence of any need for West Drive as a traffic artery. Three major four-lane streets, McLean, University and Trezevant, parallel West Drive, one to the east and two to the west of it, all linking East Parkway and Jackson Avenue.2/

In accordance with standard city planning policies of protecting residential subdivisions from unnecessary traffic, the City of Memphis granted the Hein Park residents' petition and by resolution closed West Drive.

The plaintiffs, black persons who claimed to own or have some interest in property north of Hein Park, sued in the United States District Court to enjoin the City from closing the street. Their

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2/ See Map, App. 168; also App. 122 (Testimony of Robert Miller).

Complaint averred that the street closing violated 42 U.S.C. § 1982 by conferring benefits, to wit, the privacy and quiet of an exclusive dead-end street, on whites which the City had refused to confer on similarly situated black neighborhoods.3/ This Complaint was dismissed on motion.

On appeal, the Sixth Circuit held that plaintiffs' allegations of racial motivation on the part of the City was sufficient to state a cause of action under 42 U.S.C. §§ 1982 and 1983. However, the Court expressly advised plaintiffs that the validity of their complaint rested entirely upon their claims of deliberate racial motivation. Greene v. City of Memphis, 535 F.2d 976 (6th Cir. 1976)("Greene I").

Upon remand and trial, the district court expressly found no sufficient proof of racial motivation on the part of the City, and no detriment to any property rights of plaintiffs, and again dismissed their Complaint.4/ App. 161, 155.

3/ See Greene v. City of Memphis, 535 F.2d 976, 978 (6th Cir. 1976); App. 40.

4/ The plaintiffs did not even attempt to prove their allegation that the City had declined similar street-closing petitions by black citizens.

On second appeal, the Court of Appeals dismissed its earlier requirement of racial motivation as "dicta" and held that the district court had erred in failing to give relief, because despite absence of racial motivation, "the pattern of discrimination here was indeed 'stark' and was in a very real sense a badge of slavery violative of plaintiffs' rights under the Thirteenth Amendment and subject to relief under 42 U.S.C. § 1982." App. 180.

The Court expressly declined to "establish any legal guideline for the determination of when conduct may amount to a badge of slavery." However, the only specific statement which it made in that regard was that: "The community to be benefited by the closing was and had historically been all white. Conversely, the territory to be burdened by the closing was predominantly black." App. 185.

In desperately reaching for some basis for relating its holding to plaintiffs' property rights, as required by 42 U.S.C. § 1982, the Court referred to "some evidence credited by the district court, of an economic depreciation in property values in the predominantly black residential area...." App. 185.5/

5/ Emphasis added.

This is a truly unfortunate twisting of the record. The district court had made the express finding that plaintiffs had suffered no damage to their property. Plaintiffs' own expert witness testified that in his opinion "there would not be a lessening of value in those properties in the Springdale area." App. 176. The district court acknowledged this. App. 155.

To parlay that testimony and finding into a conclusion by the appellate court that plaintiffs have been deprived of property rights in violation of § 1982 involves impermissible liberties with the record.

Judge Celebrezze dissented upon the grounds that 42 U.S.C. § 1982 requires proof of discriminatory intent, which was not present here. There was "not even a scintilla of evidence" that the City closed the street because of the adverse effect of such closing on the black citizens north of Hein Park, and neither the disparate impact of the closing nor its historical background constituted circumstantial evidence of racial intent. App. 196.

The essential holding by the Court of Appeals is that, upon the district court's findings, and the proof "credited" by him, there existed a pattern of discrimination which "was indeed 'stark' and was in a very real sense a badge of slavery violative of plaintiffs' rights under the Thirteenth

Amendment and subject to relief under 42 U.S.C. § 1982." App. 180.

This conclusion was arrived at despite the following findings of the district court:

(1) That the action of the City Council did not create a benefit for white citizens which has been denied to blacks; App. 159.

(2) There is not sufficient proof of racially discriminatory intent or purpose on the part of the city officials to establish a constitutional violation;6/ App. 161.

(3) "This District Court does not believe that the disparate impact is so stark that a purpose or intent of racial discrimination may be inferred;" App. 161.

(4) That "[t]his Court does not find a purpose or intent to racially discriminate...." App. 162.

(5) That the trial judge should refrain from applying his judgement on the merits, even though he felt the closing would have an adverse impact on

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6/ The record discloses that this is an understatment. As Judge Celebrezze pointed out in dissent, "The record contains not even a scintilla of evidence" of unlawful racial intent. App. 196.

black citizens and would cause aggravation of racial hostility, with attendant retribution and vandalism. App. 163.

SUMMARY OF ARGUMENT

This case involves an ordinary street closing, for the purpose of protecting a residential subdivision from unnecessary traffic. The closure was without any racial motivation. Under those circumstances the action of the city does not constitute a violation of the Thirteenth Amendment, or of 42 U.S.C. § 1982, as against black property owners outside the subdivision who claimed that the closing had a disparate effect upon them.

It is clear that a municipality has the right to protect the quality of life in residential subdivisions by restricting the flow of traffic through it.

Where a municipal action racially neutral on its face, restricts blacks and whites equally, and differentiates only on a geographical basis, it cannot be deemed a "badge of slavery."

Even though a municipal action has a disparate effect upon certain black persons, that alone does not render it an unconstitutional discrimination. To be unlawful, such action must be proved to have been motivated by a discriminatory purpose or intent, i.e., an intent

to take the action "because of" its adverse effects upon an identifiable group. There is not the slightest suggestion in the record here that the closing of West Drive was racially motivated, much less done because of its effect upon the property of the plaintiffs lying outside the Hein Park subdivision.

The Court of Appeals reached the conclusion that the closing of West Drive amounted to "stark discrimination" and a "badge of slavery", not because of any racial motivation on the part of the city, but upon allegations that such action would create racial hostility, retributions and vandalism. The validity of a municipal government's action should not depend upon the reaction to it of certain elements in the community.

The ruling of the Court of Appeals deprives the residents of Hein Park subdivision of the benefit and protection of a permissible action of their city government, solely on the ground that they are members of the white race.

In the absence of any intent to discriminate against blacks, or any action aimed at blacks as a group, or any substantial injury to blacks, the closing of West Drive should not be enjoined.

The Closing Of A Street To Protect A Residential Subdivision Is A Legitimate Municipal Action

On January 9, 1973, the Hein Park Civic Association petitioned the City Council to close West Drive at its intersection with Jackson Avenue in order to:

1. Reduce flow of traffic using subdivision streets,

2. Increase safety to the many children who live in the subdivision and those who use the subdivision to walk to Snowden Junior High School, and

3. Reduce "traffic pollution" in a residential area, e.g., noise, litter, interruption of community living. App. 135, Trial Ex. 13.

The accomplishment of these goals is obviously permissible municipal policy.

In a line of recent cases, this Court recognized that reducing traffic flow in a residential neighborhood and taking other steps to increase the quality of life therein are permissible goals of the legitimate exercise of the police power retained by municipal governments. In Village of Belle Terre v. Boraas, 416 U.S. 1, 39 L. Ed. 2d 797,

94 S. Ct. 1536 (1974), this Court interpreted the validity of a zoning restriction limiting the number of non-family residents in a dwelling and observed as follows:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within Berman v. Parker [348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954)], supra. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people. 416 U.S. at 9.

In County Board v. Richards, 434 U.S. 5, 54 L. Ed. 2d 4, 98 S. Ct. 24 (1977), a municipality enacted a restriction to stem the flow of traffic from commercial and industrial districts into adjoining residential neighborhoods. This Court upheld the municipality's action in question and observed as follows:

> A community may also decide that restrictions on the flow of outside traffic into par-

> ticular residential areas would enhance the quality of life thereby reducing noise, traffic hazards, and litter. By definition, discrimination against non-residents would inhere in such restrictions. 434 U.S. at 7.

As Judge Celebrezze pointed out, the disparate impact of the city's action is between residents and non-residents of Hein Park, regardless of their race. All motorists, black or white, using West Drive, are affected identically. County Board v. Richards, supra, expressly dealt with just such an issue and held that the Constitution does not

> presume distinctions between residents and non-residents of a local neighborhood to be invidious. The Equal Protection Clause requires only that the distinction shown by an ordinance like Arlington's rationally promotes the regulation's objectives. 434 U.S. at 7.

Thus, the closing of West Drive in order to decrease vehicular traffic in the residential neighborhood and thereby foster the safety of the many children who live therein and enhance the quality of life of the residents is a permissable action taken by the City of Memphis, in the absence of an intent to

discriminate against black persons or to violate a person's right to hold property under 42 U.S.C. § 1982.

The Closing Of The Street Does Not Constitute A "Badge Of Slavery"

As pointed out above, the reasoning of the Court of Appeals in the present case is simply that the action of the city in closing West Drive constitutes a "badge of slavery" and therefore violates the Thirteenth Amendment. This is clearly a drastic oversimplification of the issue.

In Palmer v. Thompson, 403 U.S. 217, 226, 29 L. Ed. 2d 438, 91 S. Ct. 1940 (1971), this Court held that municipal action in closing swimming pools did not constitute a "badge of slavery", even though its effect was to perpetuate separation of the races. In rejecting the "badge of slavery" argument, this Court said:

> The denial of the right of Negroes to swim in pools with white people is said to be a "badge or incident of slavery". Consequently, the argument seems to run, this Court should declare that the closing of the pools to keep the two races from swimming together violates the Thirteenth Amendment. To reach that result from the Thirteenth Amendment would

severely stretch its short simple words and do violence to its history. 403 U.S. at 226.

The contention that the city's action was a "badge of slavery" was dismissed as a "faint and unpersuasive argument." Id.

In the instant case, the "badge of slavery" argument is much weaker than in Palmer v. Thompson. Here, there was no racial motivation, no intent to discriminate, no effort to separate blacks from whites, no municipal action aimed at the black community.7/ To the extent that there is a disparate impact of the city's action, it is between residents and non-residents, regardless of their race. All motorists, black or white, are inconvenienced equally. As was pointed out by Judge Celebrezze, there is no constitutionally guaranteed right of free access to neighborhood streets. If black persons are more inconvenienced than whites from the closing of West Drive, this is a

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7/ These facts completely distinguish this case from those contained in Justice Douglas' list cited by the Court of Appeals. App. 183-84. Each of those cases involved deliberate, racially motivated actions aimed directly at blacks as a class.

geographical happenstance, and not an incident of slavery. There is not the slightest hint of an indication in the record that the city's action would have been any different if all of the people residing north of Hein Park had been white.

Whatever a "badge of slavery" may be, it cannot exist without racial motivation.

Disparate Impact Does Not Amount To Unlawful Discrimination

In its summary of the facts relied on for its conclusion, the Court of Appeals stated that

> The community to be benefited by the closing was and had historically been all white. Conversely, the territory to be burdened by the closing was predominantly black. App. 185.

This appears to be the ultimate basis of the finding of the stark discrimination. In relying on a disparate impact for its conclusion of validity, the Court of Appeals clearly misconstrued the law as announced by this Court.

In Washington v. Davis, 426 U.S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976), this Court held that a disproportionate racial impact did not render

an otherwise neutral action discriminatory. The Court said:

> But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a disproportionate impact.8/ 426 U.S. at 239.

Recognizing that an invidious purpose may often be inferred from the totality of the relevant facts, including disparate impact, the Court said:

> Disproportionate impact is not irrelevant but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule...that racial classifications are to be subject to the strictest scrutiny and are justifiable only by the weightiest of considerations. 426 U.S. at 242.

In a similar vein, Chief Justice Burger, concurring in Palmer v. Thompson, 403

8/ Emphasis by the Court.

U.S. 217, 29 L. Ed. 2d 438, 91 S. Ct. 1940 (1976) said:

> We would do a grave disservice, both to elected officials and to the public, were we to require that every decision of local governments to terminate a desirable service be subjected to microscopic scrutiny for forbidden motives rendering the decision unconstitutional. 403 U.S. at 228.

Judge Celebrezze in his dissent disposed of any contention that an invidious purpose might be inferred from the historical background of the city's action. It was done in the normal manner, in resonse to an appropriate application to the Planning Commission, and was consistent with approvals granted to other applicants, including black citizens, to close streets and alleys.

Without Discriminatory Purpose There Is No Denial Of Equal Protection

One of the strangest things about this case is the Court of Appeals' rejection, on the second appeal, of the basic proposition announced on the first appeal. In Greene I, 535 F.2d 976 (6th Cir. 1976), the Court, in remanding the case for trial, emphatically instructed the district court that, in order to

establish a § 1982 or § 1983 claim, the plaintiff

> must prove his allegations that city officials conferred the closed street on West Drive residents because of their color; he must prove racial motivation, intent or purpose, in the absence of such egregious differential treatment as to in itself violate equal protection, or, alternatively, to command an inference of racial motivation. 535 F.2d at 979.

That statement is in accord with the law as held by this Court. However, on the second appeal, the Court of Appeals tossed aside that statement as dicta (App. 171), and held that the trial judge erred in following its earlier instruction. App. 180.

The fallacy of the Court's thinking, on the second appeal, is revealed in a footnote near the end of the opinion, where it said:

> We expressly leave open here the question to what extent intent is even an element of the plaintiff's case under Section 1982. App. 186.

With deference, it is submitted that that is not an open question. This Court has held, time and again, that

equal protection is violated only when a discriminatory purpose is shown.

The most recent instance is Personnel Administrator v. Feeney, ____ U.S. ___, 60 L. Ed. 2d 870, ___ S. Ct. ____ (1979). In upholding a Massachusetts veterans' preference act which impacted differently upon men and women, this Court said:

> But, as was made clear in Washington v. Davis, 426 U.S. 229, 48 L. Ed. 2d 579, 96 S. Ct. 2040, and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 555, even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose. ___ U.S. ___, 60 L. Ed. 2d at 883.

Furthermore, the Court defined "discriminatory purpose" as meaning more than mere volition or awareness of consequences. It implies that the decisionmaker

> selected or reaffirmed a particular course of action at least in part "because of," not

> merely "in spite of," its adverse effects upon an identifiable group. ____ U.S. at ____, 60 L. Ed. 2d at 887-88.

The case closest in point factually is Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977) where this Court reversed a Court of Appeals ruling which struck down a zoning ordinance because in practice it produced a racially discriminatory effect. The Court found that absence of racial motivation on the part of the city was determinative, stating:

> Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision. This conclusion ends the constitutional inquiry. The Court of Appeals' further finding that the Village's decision carried a discriminatory "ultimate effect" is without independent constitutional significance. 429 U.S. at 270-71. (Emphasis added).

In reaching its decision in Arlington Heights, the Court relied upon Washington v. Davis, 426 U.S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976),

where it had upheld a testing requirement for police which tended to exclude more blacks than whites. The contention there was that the city's practice violated, among other things, 42 U.S.C. § 1981. In holding that disparate impact alone would not invalidate the city's action, the Court took pains to disavow the proposition "that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation...." 426 U.S. at 245.

There can be no distinction of this case from Feeney, Arlington Heights and Washington v. Davis on the ground that plaintiffs here invoked § 1982 instead of the Equal Protection Clause. The Court of Appeals itself, in the passages quoted from its Greene I opinion, recognized this as an equal protection issue. The Washington v. Davis holding with respect to a § 1981 claim was cited as controlling in Arlington Heights, which was brought under the Fourteenth Amendment and the Fair Housing Act. (42 U.S.C. § 3601). The substantive principle that unlawful discrimination by regulation requires a racial motivation is applicable regardless of the statute invoked. It is the substantive municipal action, not the legal nomenclature, which must control.

The Only Evidence Of "Stark Discrimination" Is The Negative Reaction Of Some Black Citizens

The ultimate finding of the Court of Appeals is that the closing of the city street is discrimination which is so stark that it constitutes a badge of slavery. What evidence or finding of the trial court leads to this conclusion? There is no scintilla of evidence of racial motivation on the city's part. There is no finding by the trial court of detriment to the property of blacks; their own expert testified to that effect. There is not even any appreciable traffic inconvenience; the users of West Drive do not save any distance by making that street a traffic artery.

The only evidence of "stark discrimination" cited by the Court of Appeals is the negative reaction of certain black citizens to the closing of the street. The opinion cites the trial remark of the District Judge that the city's action would aggravate racial tensions and cause "retribution and vandalism," and "defiance and confrontation". App. 173. It quoted from the expert testimony of a college professor psychologist that the reactions of the blacks would be an "increase in hostility" and "acts of vandalism" and destruction of "harmony," and resultant increase in police

activity.9/ App. 176. The only evidence cited by the Court of Appeals relating to any effect on property values is the theorizing of a real estate expert that the resentment of people in a lower economic social group against the city's actions on behalf of wealthier Hein Park residents would affect their "moralistic values on their properties", so that they would not keep them up as well. App. 176.

It is clear, therefore, that the Court of Appeals felt a racially neutral street closing became wrongful just because some black citizens resented it. The "stark discrimination" arose not from the actions of the city, but the reaction of certain blacks. The evils anticipated to result from the closing were not direct property depreciation or even inconvenience, but hostility, vandalism and disorder on the part of the black community.

Such reasoning finds no precedent in the opinions of this or any other court. It must not be allowed to become a part of our jurisprudence.

9/ The event has proved these predictions totally wrong. In the year that the street has been closed, there has been no disturbance whatsoever on the part of the black neighbors.

The Result Below Denies Equal Protection To Hein Park Residents

As heretofore pointed out, this Court has long recognized the propriety of a municipality's protecting residential areas against unnecessary and undesirable flow of traffic. Village of Belle Terre v. Boraas, supra, County Board v. Richards, supra. The residents of Hein Park subdivision are entitled to such protection, in the discretion of the municipal officials. They have been afforded such protection by the closing of West Drive. It concededly benefits their property values.

The ruling of the Court of Appeals would deprive the Hein Park residents of these benefits and values, solely because they are of the white race.10/ If the residents of the subdivision were black, there would be no issue about the street closing, although the traffic effect upon the Springdale area residents would be exactly the same. Conversely, if Springdale were predominantly white, then the residents of that area would not have any right to contest the closing of West Drive.

The Hein Park residents are therefore deprived of appropriate municipal

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10/ Ironically, this is not in fact the case. There are a number of black property owners in the subdivision, one on West Drive.

protection and benefits, and their properties depreciated, for no other reason than their race, under the Court of Appeals ruling. This is certainly not a result that should flow from a statute whose purpose is to promote equal protection of the laws.

As stated in Regents of the University of California v. Bakke, 438 U.S. 265, 289-90, 294, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978),

> The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.
>
> ....
>
> [O]ver the years, this Court has consistently repudiated 'distinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded on the doctrine of equality.'

There is nothing in the record in this case which justifies invocation of some doctrine of reverse discrimination to justify the unequal treatment received by Hein Park at the hands of the Court of Appeals, solely because of the ancestry of its residents.

CONCLUSION

This is not a case in which black citizens have been subjected to invidious discrimination. It is a usual and normal action of a municipality, to accomplish a permissible goal.

There is no evidence of racial motivation, and no substantial evidence of detriment to plaintiffs' property values.

The opinion of the Court of Appeals should be reversed.

Respectfully submitted,

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